Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JOHN M. EDENFIELD and
JAMES C. EDENFIELD,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN R. MARTIN
MARTIN BROTHERS, P.C.
44 Broad Street, N.W.
500 Grant Building
Atlanta, GA 30303
(404) 522-0400

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER IN JUDGING A GOVERNMENT MISCONDUCT CLAIM UNDER THE DUE PROCESS CLAUSE THE IMPROPER MOTIVATION OF GOVERNMENT AGENTS IN PURSUING A POTENTIAL TARGET, HERE POLITICAL REVENGE BY A SHERIFF AGAINST AN IMPORTANT SUPPORTER OF HIS OPPONENT IN A RECENT ELECTION, IS IRRELEVANT.

II.

WHETHER IN JUDGING A GOVERNMENT MISCONDUCT CLAIM UNDER THE DUE PROCESS CLAUSE THE DEGREE OF SUSPECTED CRIMINAL INVOLVEMENT BY THE TARGETS OF THE INVESTIGATION IS IRRELEVANT; I.E. WHETHER THE SAME LAW ENFORCEMENT CONDUCT IS PERMISSIBLE WITH RESPECT TO ALL "DISTRIBUTORS" OF COCAINE, WHETHER THEY BE "HARD CORE" PROFESSIONAL DISTRIBUTORS FOR PROFIT OR "SOCIAL" DISTRIBUTORS WHO MERELY SHARE COCAINE WITH FRIENDS OR "DISTRIBUTE" SMALL QUANTITIES TO FRIENDS FOR COST.

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The Petitioners, **JOHN M. EDENFIELD** and **JAMES C. EDENFIELD**, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh

Circuit, entered in the above entitled proceeding on July 14, 1993.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Georgia dismissing the indictment against Petitioners on due process grounds is not reported. The decision of the Court of Appeals for the Eleventh Circuit reversing and vacating the decision of the District Court for the Northern District of Georgia is reported at 995 F.2d 197 (11th Cir. 1993). Both opinions are set forth in the appendix hereto.

JURISDICTION

On May 26, 1992, the District Court for the Northern District of Georgia

dismissed the indictment against the Petitioners John M. Edenfield and James C. Edenfield due to law enforcement misconduct in violation of the Due Process Clause. The United States appealed to the Eleventh Circuit Court of Appeals, pursuant to 18 U.S.C. §3731. On July 17, 1993, the Eleventh Circuit reversed the District Court. On March 28, 1994, the Eleventh Circuit denied a timely filed petition for rehearing and suggestion for rehearing en banc. This Court has jurisdiction to review the decision of the Eleventh Circuit under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

Fifth Amendment to the United States Constitution.:

"No person shall be held to answer

for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

(A) Course of Proceedings and Disposition in the Courts Below

Petitioners John M. Edenfield and James C. Edenfield (hereinafter also referred to as "Defendants" or "John

Edenfield" or "James ("Jim") Edenfield") were charged by the United States in a four count indictment with conspiracy and possession with intent to distribute cocaine under 21 U.S.C. §§841(a)(1) and 846. (R1:1; R2:1) To this indictment they pled not guilty. (R1:3; R2:4).

The Defendants filed timely motions to dismiss the indictment under the Due Process Clause because of law enforcement misconduct in the investigation of their case. (R1:9, 34; R2:22, 34). Three days of testimony was heard and 53 exhibits received into evidence. (R3; R4; R5). The magistrate recommended that the motions be denied. (R1:58; R2:58). On May 26, 1992, District Court Judge Robert L. Vining, Jr., however, rejected the magistrate's recommendation and dismissed the indictment on due process grounds.

(R1:62; R2:62). Appendix Exhibit "A".

The Government appealed to the Court of Appeals for the Eleventh Circuit. (R1:66; R2:66). On July 14, 1993, a panel of the Eleventh Circuit granted the Government's appeal, vacating the District Court's order dismissing the indictment and remanding the case for further proceedings. United States v. Edenfield, 995 F.2d 197 (11th Cir. 1993). Appendix Exhibit "B". The Defendants filed a timely petition for rehearing and suggestion for rehearing en banc, which was denied on March 28, 1994. Appendix Exhibit "C". A stay of the mandate pending a petition for writ of certiorari to this Court was granted on May 16, 1994. Petitioners now file a timely petition for writ of certiorari.

(B) **Statement Of Facts Necessary to Argument Of The Issues**

The District Court found that in the summer and early fall of 1989, Merrill Greathouse, Sheriff of Upson County, Georgia, and other law enforcement officials, believed that the Edenfields, who are fraternal twins, were recreational users of cocaine who had made relatively small purchases and who on occasion gave cocaine to friends or sold small amounts (a gram or less) at cost. It was known that the Edenfields were not drug traffickers for profit. (R1:62:2,19; R2:62:2,19).

In 1988, Sheriff Greathouse had stood for re-election in largely rural Upson County. John Edenfield, Sr., the father of the Defendants, had been a previous supporter of Sheriff Greathouse, but there had been an angry "falling out"

over what John Edenfield, Sr. thought, rightfully, was an unwarranted and baseless investigation of a loyal employee. John Edenfield, Sr. became a supporter of Sheriff Greathouse's opponent, who lost to Sheriff Greathouse in an acrimonious and close election.

The District Court found that the subsequent investigation of the Edenfields in 1989 by Sheriff Greathouse and others to implicate the Edenfields in a cocaine trafficking charge under Georgia law was motivated by political and personal revenge by Sheriff Greathouse against the Edenfields due to the political opposition of the Edenfields to Sheriff Greathouse during the re-election campaign. The Court specifically found that Sheriff Greathouse and others were seeking "to improperly employ their

significant power and resources to settle personal scores." (R1-62:3, 15; R2-62:3,15).

The District Court further found that in order to extract vengeance on the Edenfields, Sheriff Greathouse and others entered into a contingent fee arrangement with an informant, Tony Watson. Sheriff Greathouse promised Watson a sizable reward if he were able to lure or to engineer an Edenfield to be in sole possession of more than an ounce of cocaine. Possession of more than an ounce was critical, because under the Georgia drug trafficking statute, the possession of this amount or more requires a minimum term of imprisonment of 10 years and a $100,000 fine, without the possibility of probation. O.C.G.A. §16-13-31(a)(1)(A). No effort was made to

train or control the informant. He was never advised not to entrap the Defendants. Indeed, Sheriff Greathouse knew that the informant was often drunk and probably using cocaine himself while working undercover for the Sheriff. (R1-62:7-8, 15-17; R2-62:7-8, 15-17).

Finally, the District Court found that although law enforcement officials knew that the Edenfields were not drug traffickers for profit, they nevertheless endeavored to "get" an Edenfield in possession of an amount of cocaine sufficient to make a trafficking case under Georgia law. The agents arranged for their informant to purchase more than an ounce of cocaine on November 10, 1989, from a source unknown to Jim Edenfield, but arranged by the informant. The informant's ruse was that he wanted to

buy over half an ounce for himself in addition to what Jim Edenfield wanted to purchase so that more than an ounce would be obtained. Instead of keeping the packages separate, however, the informant gave all of the cocaine to Jim Edenfield for his transportation back to their homes in Upson County and formulated an excuse to exit the car so that Jim Edenfield would be by himself with over an ounce of cocaine at the time that the arrest signal was given. (R1-62:8-10, 17-20; R2-62:8-10, 17-20).

Prior to the November 10, 1989 incident, there had been at least 4 separate "controlled" buys of cocaine by the informant from the Edenfields.[1] On

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[1]Although the Court of Appeals incorrectly states that these were buys of "one-eighth ounce amounts of cocaine" (995 F.2d at 199), in fact only two of (continued...)

each of these occasions the investigating officers had clear evidence of the Edenfields' involvement in cocaine. However, no search warrant was executed, or arrest made, because the investigative agents were not content with a simple possession or a small distribution case against the Edenfields. Instead, they would be satisfied with no less than a trafficking charge, i.e. possession of more than an ounce, the contingent fee arrangement they had made with their informant. (R1-62:4-7, 16; R2-62:7, 16).

The District Court found that although no particular circumstance was controlling, the totality of the above actions constituted misconduct "so egregious as to offend principles of due

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[1](...continued)
the purchases were for that amount. The other two were significantly less.

process" and require dismissal. (R1-61:20; R2-62:20). This conclusion made it unnecessary for the Court to consider other evidence of misconduct marshalled by the Defendants, including efforts to prevent the defense from learning of the improper scheme of the investigating officers, destruction of evidence by law enforcement officials and perjury by law enforcement witnesses regarding their misconduct.

The District Court summarized its findings as follows:

> While no one factor is controlling in this matter the Court finds that given the political and personal interest of law enforcement officials involved in this case, the preselection of the investigatory target, the government's entering into a contingent fee agreement with an informant to get an Edenfield, and the over-involvement of the informant as an agent of the government in the planning

and execution of the crime charged, law enforcement misconduct in this case is so egregious as to offend principles of due process. The government whether state or federal, is supposed to be in the business of investigating and intercepting crime in order to punish and deter wrongdoers. The government may not initiate crimes. A sense of ordered justice does not allow for law enforcement activity which results in the preselection of a particular individual for investigation and which results in law enforcement agents acting to ensure that a more serious crime is committed by that targeted individual as a result of the investigation than would have been committed without the acts of the government. (R1-62:20; R2-62:20). (Appendix Exhibit "A", p. 20).

REASONS FOR GRANTING THE WRIT

A. Introduction

Petitioners recognize that due process challenges for outrageous government conduct are by their very nature fact-specific. What might be shocking to the "universal sense of justice", United States v. Russell, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973), to one judge might not be similarly shocking to the same "universal sense of justice" of another. This point was never made more clearly than in this case, where the District Court was offended by the circumstances of the government investigation, while the Circuit Court, adopting the factual conclusions of the District Court, was unimpressed with the Petitioners' claims of outrageous misconduct.

Of course, resolution of fact-specific questions are not typically subject to Supreme Court review. However, here, in diminishing the significance of several of the factors of government misconduct found by the District Court, the Circuit Court applied questionable legal analyses contrary to Supreme Court authority or without legal precedent and of doubtful validity.

B. Political Motivation

THE CIRCUIT COURT ERRED AND MISAPPLIED SUPREME COURT AUTHORITY IN HOLDING THAT THE MOTIVATION OF GOVERNMENT AGENTS IN PURSUING A POTENTIAL TARGET, HERE POLITICAL REVENGE BY A SHERIFF AGAINST AN IMPORTANT SUPPORTER OF HIS OPPONENT IN A RECENT ELECTION, IS IRRELEVANT IN JUDGING THE "TOTALITY OF CIRCUMSTANCES" OF GOVERNMENT MISCONDUCT INVOLVED IN THE INVESTIGATION AND PROSECUTION OF A DEFENDANT.

The District Court clearly found that Sheriff Greathouse's intensive investigation of the Edenfields, including the engagement of Tony Watson as a contingently motivated informant to be paid only upon producing all of the evidence necessary to convict an Edenfield of trafficking in cocaine under Georgia law, was motivated by the desire to obtain political revenge against the Edenfields. This political and personal motivation was one of the "totality of

circumstances" emphasized by the District Court in finding a due process violation. As the District Court found, "While law enforcement should be given great flexibility in investigating crime, to maintain justice, fairness and decency in the criminal justice process, law enforcement officials cannot be allowed to improperly employ their significant power and resources to settle personal scores." (R1-62:15, 20; R2-62:15, 20). (Appendix Exhibit "A", p. 15)

The Circuit Court, however, found the political and personal motivations of Sheriff Greathouse to be "irrelevant", at least for "due process purposes." 995 F.2d at 200. (Appendix Exhibit "B"). Without citation to any authority in support of its position, the Circuit Court opined that due process claims deal

only with "outrageous misconduct" (emphasis in original) and "an officer's possible motive" is of no concern. 995 F.2d at 200. According to the Circuit Court, the motivation of law enforcement officers, no matter how inappropriate or contrary to principles of "fundamental fairness" uniformly accepted in a free society, should not even be considered in judging the "totality of the circumstances" involved in a law enforcement misconduct claim under the Due Process Clause.

Petitioners know of no case supporting the Circuit Court's position. No distinction between "conduct" and "motive", even if one can intelligently be drawn, has ever appeared in the case law regarding government misconduct claims. Courts are directed to consider the "totality of the circumstances" whatever

they may be, "with no single factor controlling". See, e.g., United States v. Tobias, 662 F.2d 381, 387 (5th Cir. 1981). Moreover, the ultimate question is whether the actions of the government violated "that 'fundamental fairness shocking to the universal sense of justice', mandated by the Due Process Clause." United States v. Russell, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973); United States v. Rochin, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed.2d 183 (1952). Under this test both logic and intuition calls for consideration of all factors involved, including the nature of the officer's motives.

A typical citizen in judging whether or not government conduct shocked his or her "universal sense of justice" would

certainly not exclude the reasons behind the officers' conduct. Why should the courts? Afterall, the reason that we want to know whether or not the target of a contingent fee arrangement was "pre-selected" is for fear that improperly motivated law enforcement officials would target their guile and substantial resources to induce someone to commit a crime they would not otherwise commit. Moreover, in other contexts the motivation of investigators or prosecutors, particularly political motivations which are rightfully subject to careful scrutiny in a democratic society, are of paramount importance. Cf., United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987)(Selective prosecution claim based upon prosecution motivated by a desire to punish "the principal political organiza-

tion representing blacks" with the assistance of the "rival white political organization."); United States v. Falk, 479 F.2d 616, 623 (7th Cir. 1973)(en banc)(Improper selective prosecution of vocal draft resister in order to punish him for his opposition to the Vietnam war); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972)(Selective prosecution of participant in census resistance movement).

To exclude political motivations, no matter how inappropriate or dangerous to a free society, from any consideration in determining the "totality of the circumstances" in a due process challenge to a prosecution as somehow "irrelevant", as would the Circuit Court here, eliminates from the determination of such cases important evidence particularly relevant

to the interests at stake, namely the "universal sense of justice." This Court should therefore review this case by issuing a Writ of Certiorari to correct this mistake of the Eleventh Circuit.

C. Degree of Criminal Involvement

THE CIRCUIT COURT ERRED AND MISAPPLIED SUPREME COURT AUTHORITY IN HOLDING THAT IN JUDGING A GOVERNMENT MISCONDUCT CLAIM UNDER THE DUE PROCESS CLAUSE NO DISTINCTION SHOULD BE DRAWN WITH RESPECT TO THE DEGREE OF SUSPECTED CRIMINAL INVOLVEMENT BY THE TARGETS OF THE INVESTIGATION; I.E. WHETHER THE SAME CONDUCT IS PERMISSIBLE WITH RESPECT TO ALL "DISTRIBUTORS" OF COCAINE, WHETHER THEY BE "HARD CORE" PROFESSIONAL DISTRIBUTORS FOR PROFIT OR "SOCIAL" DISTRIBUTORS WHO MERELY SHARE COCAINE WITH FRIENDS OR "DISTRIBUTE" SMALL QUANTITIES TO FRIENDS FOR COST.

In Hampton v. United States, 425 U.S. 489, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) this Court discussed the factors to be considered in a due process/fundamental fairness challenge to a criminal conviction based upon the outrageousness of police behavior. There, three members of the Court, Chief Justice

Burger, then Justice Rehnquist and Justice White, opined that due process principles would never prevent the conviction of a predisposed defendant regardless of the outrageousness of police conduct in investigating and prosecuting the case. Justices Powell and Blackmun concurred in the judgment of the Court upholding the convictions of the defendant, but, however, refused "to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power would support a bar to conviction in any case where the Government is able to prove predisposition." 425 U.S. at 495, 96 S.Ct. at 1653. According to Justices Powell and Blackmun, although the cases would be "rare", a conviction would nevertheless be barred when police

conduct reaches "a demcnstrable level of outrageousness." 425 U.S. at 495 n.7, 96 S.Ct. at 1653 n.7. The three dissenters, Justice Brennen, Stewart and Marshall, agreed and found sufficient misconduct in Hampton to vacate the conviction.[2]

An important, and often overlooked, portion of the crucial concurring opinion of Justices Powell and Blackmun is the position advanced by the justices that the outrageousness of police conduct must be judged in relation to the "widely varying degrees of criminal involvement" of the individuals subject to police investigation. Using narcotics as an example, the justices noted that the

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[2]Justice Stevens took no part in the consideration or decision of the case.

"criminal involvement of pushers varies widely." On one end of the spectrum is the "hard core professional in the 'business' on a large scale and for years" and on the other end of the spectrum is "the high school youth whose 'pushing' is limited to a few of his classmates over a short span of time." Although in both situations the defendant is a predisposed "pusher", the obvious differences in the circumstances should be relevant in judging the outrageousness of the government conduct "relative to the circumstances." 425 U.S. at 494 fn 5, 96 S.Ct. at 1652 fn 5. What "fundamental fairness" and the "universal sense of justice" might countenance in the investigation of a suspect at one end of the continuum of "predisposed activity" might not be similarly acceptable for investi-

gation of a suspect at the other end of the continuum.

Here, the Circuit Court totally ignored these admonitions in the opinion of Justices Powell and Blackmun, critical to the majority in Hampton. The Circuit Court described the defendants as "long-time and admitted distributors", 995 F.2d at 201, as if all cocaine "distributors" are the same. The Edenfields, who the District Court found "were users of cocaine and would sometimes distribute cocaine to others in amounts of a gram or less, purely on a social basis" and never "for profit or in large amounts" (R1-62:2; R2-62:2), may not qualify as a "high-school youth" whose "pushing is limited to a few of his classmates over a short span of time," but their criminal involvement was much closer to the "high-

school youth" end of the spectrum than the "hard core professional" at the other end of the spectrum in the concurring opinion of Justices Powell and Blackmun.

The District Court in judging the totality of the circumstances of the law enforcement conduct in this case followed the directions of Justices Powell and Blackmun by considering the degree of the suspected criminal involvement of the Defendants in deciding the due process claim. The Circuit Court in determining the outrageousness of the law enforcement officials misconduct ignored the directions of this Court, lumped all "distributors" together, and failed to weigh the investigative techniques used against the seriousness of the suspected criminal involvement of the Defendants. This was a fundamental misapplication of binding

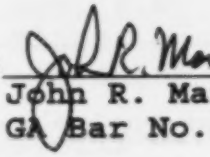
authority of the Supreme Court which should be corrected by this Court through granting the requested Writ of Certiorari.

CONCLUSION

The opinion of the Eleventh Circuit in this case carved out an important new evidentiary rule in government misconduct claims, namely that the motivation of law enforcement officers is in all cases irrelevant, which is not only without precedent but is illogical and unwise. This holding should be corrected. Similarly, in reaching its decision, the Eleventh Circuit refused to apply or misapplied the directions of this Court that the degree of the suspected criminal involvement of a defendant should be factored into the decision regarding the

outrageousness of the investigative techniques employed. Again, this erroneous conclusion by the Circuit Court should be corrected by this Court. For each of these reasons, and in combination, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
MARTIN BROTHERS, P.C.

By: 
John R. Martin
GA Bar No. 473325

44 Broad Street, N.W.
500 Grant Building
Atlanta, GA 30303
(404) 522-0400

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PROOF OF SERVICE

I, **JOHN R. MARTIN**, do declare that on this date, June 7, 1994, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached **PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT** on each party to the above proceeding, or that party's counsel, and on every other

person required to be served by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addressed of those served are as follows:

Mary Jane Stewart
Assistant United States Attorney
1800 Richard Russell Building
75 Spring Street, S.W.
Atlanta, GA 30303
Counsel for Respondent

Hon. Drew Days, III
Solicitor General
Main Justice Building, Room 5143
10th & Constitution
Washington, D.C. 20530
Counsel for Respondent

John M. Edenfield
James C. Edenfield
P.O. Box 1057
Thomaston, GA 30286
Petitioners

John R. Martin
Counsel for Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	)
	)
vs.	)
	) NO. 1:90-CR-415
JAMES EDENFIELD and	)
JOHN EDENFIELD	)
----------	)
UNITED STATES OF AMERICA	)
	) NO. 1:90-CR-416
vs.	)
	)
STEVEN T. FRADY	)

O R D E R

This matter comes before the court upon the Magistrate's Report and Recommendation as to defendant John M. Edenfield, defendant James Edenfield, and defendant Steven Frady.

The court adopts, with some additions, the findings of fact as found in the Magistrate's Report and Recommendation. The Magistrate found that in the summer of 1989 Tony Watson was a business

partner with Allen Adams in a used car business in Thomaston, Georgia. That summer the used car business was failing. Tony Watson had been a lifelong friend of the defendants John and James Edenfield who are sons of a prominent businessman in Thomaston. Watson had used cocaine on a social basis with both Jim and John on a number of occasions. Typically John and Jim Edenfield would merely share cocaine with him or give him cocaine for his own use. On the few occasions when Watson bought cocaine from John and Jim Edenfield it was understood that he was paying the same price that either John or Jim had paid for the cocaine.

Sheriff Greathouse and others had heard "street talk" that the Edenfields were involved in cocaine. However, all the information indicated that the Eden-

fields were users of cocaine and would sometimes distribute cocaine to others in amounts of a gram or less, purely on a social basis. No one had information that the Edenfields were distributing cocaine for profit or in large amounts.

In spite of the lifelong friendship, Watson was jealous of the Edenfields' wealth and he believed the Edenfields were laughing at his financial plight. He further resented the fact that John Edenfield, Sr. was a director of a bank that was pressuring him. Watson therefore decided he would help law enforcement get the Edenfields if he could get paid a sizeable amount of money. Watson often remarked that his way out of the trouble would be Jim and John. He felt he could take advantage of Jim Edenfield.

Watson proposed to his partner, Allen Adams, that they approach law enforcement officials about cooperating against the Edenfields and the black crack dealers in Thomaston. Adams was apprehensive about being involved but went along at first because he thought they were going to talk to the officers about black crack dealers' drug money being used to buy cars from their used car lot. He wanted to know if the used car lot was being watched by law enforcement officers.

Adams and Watson met with Sheriff Merrill Greathouse at a trailer on the river in Upson County, apparently owned by Sheriff Greathouse's son, Dan Greathouse. Watson told Sheriff Greathouse that he and Adams were willing to work undercover. Sheriff Greathouse

was receptive but no deal was made. They agreed to meet again about the proposal.

When Sheriff Greathouse stood for re-election in 1988, a campaign party on his behalf was held at John Edenfield, Sr.'s cabin. In the middle of the party John Edenfield, Sr. angrily confronted Sheriff Greathouse because he had recently learned that Sheriff Greathouse was investigating a van that had been driven by Bob Searcy. Searcy was a loyal employee of John Edenfield's Sr. Sheriff Greathouse admitted that the investigation proved to be negative. The investigation caused John Edenfield, Sr. to become a supporter of Mountain Green who was running against Greathouse for sheriff. It was a close race; Greathouse, however, prevailed in a runoff.

The next meeting concerning Watson and Adams working as informers occurred on August 31, 1989. This meeting, set up by Allen Adams, occurred at the home of State Trooper B. C. Standard who was related by marriage to Adams. Adams insisted that the meeting be held at Standard's house, because he felt more "secure" there. Sheriff Greathouse, GBI Agent Charles McMichen, Allen Adams, and Tony Watson were present, along with B. C. Standard. The possibility of Watson and Adams working undercover against certain black crack dealers, including a person named "Hoe-Doe.", was discussed. They also talked about what Watson could do with the Edenfields and their supplier, Larry Selph, and his source. Watson wanted significant money up front. He started at $50,000, reduced the amount to

$20,000, and ultimately came down to $10,000. No specific amount was promised. Watson was told that the payment would depend on what was done. Sheriff Greathouse and Charles McMichen explained to Watson that they could not pay him up front. He would have to prove himself as an informer and would be paid for what he produced. Watson was told that the GBI and the Upson County Sheriff's Office would work with him on a 50/50 basis but that payments would be made only for results or "COD." No specific agreement was reached at that time. After this meeting Adams backed out of the deal and was no longer involved.

Although no clear understanding was reached at the August 31, 1989 meeting, the Sheriff's office apparently already considered Watson to be an undercover

operative and may have begun paying him small amounts of money. The Upson County Confidential Informant ledger indicates that Sheriff Greathouse withdrew $200 in undercover informant funds on August 31, 1989, for payment to "CI-81", Waton's informant number.

On September 7, 1989, Watson, who apparently had been given a beeper number by Greathouse, reached Greathouse through the beeper and told him that he was at Houston's Restaurant near Lenox Square in Atlanta, Georgia. He stated that he was with John Edenfield and that Edenfield was about to purchase some cocaine from a person named Larry Selph. Greathouse immediately contacted McMichen and it was agreed that if John Edenfield in fact purchased cocaine Watson would wear sunglasses during the return trip to

Thomaston. The officers would be on the lookout for Watson and John Edenfield, ostensibly in order to make an arrest if they observed Watson wearing the sunglasses. According to Watson, John Edenfield did purchase half an ounce of cocaine and Watson wore the sunglasses on the return trip. Although Greathouse felt certain he saw the sunglasses, he and McMichen did not stop the car, because Watson had not yet proven himself reliable. Later Watson was told by Greathouse that the reason that they did not make a stop was because they could not tell whether or not Watson was wearing the sunglasses.

On September 11, 1989, Jim Edenfield apparently called Watson and told him to come over and get some cocaine. Watson met with Greathouse who watched him go in

Jim Edenfield's house. Watson was searched before going into the house, stayed approximately two minutes, and returned with a small piece of paper wrapped with tape, marked with an "x." It contained a gram or less of cocaine. The Sheriff had clear evidence that Jim Edenfield had provided Watson with a small amount of cocaine, but again, no arrest was made.

On September 16, 1989, Watson called Greathouse and said that he and Jim Edenfield had received two "eight balls" (1/8 of an ounce or 3 1/2 grams each) of cocaine from Larry Selph in Atlanta. He said he could buy one of the eight balls from Jim Edenfield. On September 18, 1989, Watson met with Greathouse and McMichen and was wired. He was given $250 to make the buy. Watson made the

purchase, but due to the fact that the cocaine was weak, Jim had sold him the eight ball for only $65. This was apparently the same amount Jim had paid for it. Watson kept the balance of the money.

There was no further undercover activity until October 14, 1989, when Watson called Greathouse and told him that Jim Edenfield wanted to go to Atlanta to buy some cocaine. Watson himself had arranged for this purchase. The cocaine was to be obtained from Steve Frady at the Varsity. Frady was an old friend of Watson's whom he had gotten to know through the used car business. He had obtained cocaine from Frady on a social basis on a number of occasions. Watson knew that Frady knew people from whom larger amounts of cocaine could be

obtained. Watson suggested that Frady be brought in as a source for the cocaine to be bought by the Edenfields so that he could better control the transactions. McMichen called Special Agent James Tarvin of the GBI to observe the transaction at the Varsity and to take pictures. Watson later called and said that after the purchase of the cocaine at the Varsity, Jim Edenfield was taking all of the cocaine to his house to weigh it. Watson was given $250 to make another controlled buy of an eight ball. Watson was searched and went to Jim Edenfield's house and return with what appeared to be an eight ball of cocaine. Again, even though this was the third controlled buy and the officers had plenty of probable cause to go ahead and execute a search

warrant at Jim Edenfield's house, no action was taken.

On October 21, 1989, a controlled buy of cocaine was made by Watson from Jim Edenfield. There had now been several separate controlled buys and some were witnessed and photographed.

By this time Watson had been paid approximately $3600 for his informant work and to purchase cocaine. Two one thousand dollar payments, one by the Sheriff and one by the GBI had been made on October 5 and 6, 1989, in conformity with the 50/50 understanding. Apparently Watson needed the money to pay a loan and Greathouse and McMichen agreed to pay him the $2,000 for the work he had already done at that point. Nevertheless, no arrests had been made.

Sheriff Greathouse had brought McMichen into the case because he wanted some insulation from the charges that the case against the Edenfields was politically motivated. Sheriff Greathouse also testified that the GBI wanted to work a trafficking case against Frady. To work a trafficking case they would have to catch Frady selling an ounce of cocaine. Frady was not arrested until the investigation was transferred to the United States Attorney's office many months after the November 10, 1989, arrest of Jim Edenfield.

Greathouse and McMichen were interested in catching an Edenfield on a trafficking charge. Sheriff Greathouse and Agent McMichen wanted a cocaine trafficking case under O.C.G.A. § 16-13-31 against an Edenfield. If they could

catch an Edenfield in possession of more than an ounce of cocaine, under O.C.G.A. § 16-13-31(a)(1)(A), they would be guaranteed a minimum term of imprisonment of ten years and a $100,000 fine, without the possibility of probation.

Watson contends that the Sheriff agreed on October 21, 1989, to pay him $10,000 if he could get Jim Edenfield in a car alone with over an ounce of cocaine. Watson testified that the $10,000 was to be paid $4,000 on October 23rd and $6,000 after the arrest. The Sheriff's recollection of this is different. He admits paying Watson $4,000 on the 23rd of October, 1989, but denies any promise to pay another $6,000. Sheriff Greathouse borrowed $3,000 personally from the West Central Georgia Bank and obtained

another $1,000 from unknown sources to make up the $4,000 payment to Watson.

Watson testified that he was not given any training or instructions as to the law of entrapment. Sheriff Greathouse testified that Watson "was definitely using alcohol and in all probability cocaine" during the period that he was working as an informant.

On November 10, 1989, Jim Edenfield called Watson and said he wanted to buy "14." Watson interpreted this to mean that Edenfield wanted to buy $1,400 worth of cocaine, which at that time was approximately an ounce. Watson immediately called Sheriff Greathouse and told him that Edenfield wanted to buy an ounce. Watson contacted Frady in Atlanta and ordered an ounce. On one or two previous

occasions Watson had bought similar quantities of cocaine from Frady.

When Watson was next contacted by Jim Edenfield he learned that when Jim Edenfield said he wanted to buy 14, he actually meant 14 grams (approximately 1/2 ounce), the amount that Jim Edenfield had purchased previously on October 14, 1989, not $1,400 worth. Jim Edenfield did not intend to buy a whole ounce of cocaine. Watson reported this immediately to the Sheriff. The Sheriff asked Watson to meet with him and McMichen either at the local DOT office or at McMichen's cabin.

Watson was instructed to buy the additional half ounce of cocaine and he was given $800 by the Sheriff to purchase the additional half ounce, plus an eight ball. McMichen testified that he told

Watson to by an extra eight ball or quarter in order to be sure there would be enough to make a trafficking case. McMichen testified that he gave Watson $500 to buy the additional cocaine and that the money was serialized so it could be traced through to Frady. They were attempting to work a trafficking case on Frady which would necessitate Frady selling over an ounce of cocaine. Even though the money was serialized, the agents did not arrest Mr. Frady. Mr. McMichen stated that Frady was not arrested because it would reveal the fact that Mr. Watson was a confidential informant.

As part of the plan, an automobile was to be left for Watson in Griffin. Watson was to tell Edenfield that he needed to pick the car up in Griffin on

the way back from Atlanta. Watson would give all the cocaine to Jim Edenfield to be later weighed and divided up at Jim Edenfield's house. This would mean that Jim would be in possession of more than an ounce of cocaine, more than half of which had been purchased by Watson with government money, even though Edenfield only intended to buy a half ounce of cocaine.

On the way from Thomaston to Atlanta, Watson told Jim Edenfield that he was going to buy the other half ounce of cocaine from Frady. When they got to Atlanta, Watson and Jim Edenfield parked in the parking lot at the Varsity. Jim Edenfield stayed in the car while Watson left and met with Frady. Watson bought the one ounce from Frady and asked Frady to sell him an additional small amount.

This was in accord with the plan to make sure that the total amount was more than an ounce. Frady sold him another eighth of an ounce. The ounce was in one package and the eighth in another. Before going back to the car Watson poured the small package of cocaine into the larger package. He gave the cocaine to Jim Edenfield upon returning to the car and Jim Edenfield put it under the seat.

As planned, Jim Edenfield dropped Tony Watson off in Griffin, ostensibly to pick up the car. Jim Edenfield then drove off by himself with more than an ounce of cocaine in the car. Watson confirmed to the officers that Jim Edenfield now had in his possession more than an ounce of cocaine. The arrest signal was given and Jim Edenfield was pulled over. The cocaine was eventually discov-

ered and Jim Edenfield was charged with trafficking in cocaine because of his possession of more than an ounce of cocaine.

Tony Watson continued to operate undercover after the arrest. He met with Jim Edenfield's wife and took possession of certain items which had not been found during the search of Jim Edenfield's house immediately after the arrest. However, it was feared that Tony Watson's role would soon be discovered. Agent James Tarvin told Watson to get out of town and Watson complied. Eventually he moved to South Carolina.

After the arrest Watson apparently thought that he was entitled to a balance of $6,000 and he asked for it. He testified that Tarvin laughed at him and told him he had been paid well for what he had

done. He complained to Sheriff Greathouse and Watson testified that Sheriff Greathouse told him that the GBI had not done its part. Sheriff Greathouse apparently paid Watson an additional $1,000 following the arrest. This $1,000 was paid approximately the first part of December, about the time that Watson left the State of Georgia. When he asked Tarvin for more money, Tarvin gave him $160 and told him he would have to talk to McMichen and Greathouse for any other money. Watson testified that he never bought an ounce of cocaine for the Edenfields before this investigation. Watson was never told that payments to him depended on a conviction of Jim or John Edenfield; however, Watson understood that he would be receiving $10,000 to

"get" an Edenfield in possession of an ounce or more of cocaine.

Watson was later contacted by Mr. Ron Barfield, an attorney, who was representing the Edenfields. Watson was promised the sum of $25,000 if he could produce a tape of Agent Jimmy Tarvin describing the incident of how Jim Edenfield was "framed." He was paid $17,500 but felt they still owed him $7,500.

The Edenfields and Frady contend that, when the circumstances of the cases against them are viewed in their entirety, the governmental conduct amounts to a deprivation of their due process rights. They contend that Sheriff Greathouse was acting out of revenge against the Edenfields because of the disagreement that Greathouse had with John Edenfield, Sr.

The defendants move this Court to dismiss the indictments against them based upon the Fifth Amendment's guarantee of due process of law. They contend that the police investigation in this case either resulted in entrapment as a matter of law or amounted to a violation of their substantive due process rights because of the improper nature of law enforcement activities which resulted in the arrests of the defendants.

Based upon the recent Supreme Court decision in Jacobson v. United States, ____ U.S. ____, 112 S.Ct. 1535 (1992), the court finds correct the Magistrate's determination that the defendants have failed to make a showing of entrapment. All the defendants clearly possessed a predisposition to violate laws prohibiting cocaine use, possession, or sale.

However, law enforcement conduct in this matter is extremely troublesome. The Supreme Court has expressed the possibility that police overinvolvement in the planning and execution of a crime may be so outrageous as to violate due process principles. See United States v. Tobias, 662 F.2d 381, 385-86 (1981). Whether government conduct rises to the level of a due process violation by offending the prevailing notions of fairness, justice, and decency expected in the conduct of an investigation and prosecution turns on the totality of the circumstances. Id. at 387.

In Tobias, the Eleventh Circuit delineated the outer limits to which law enforcement representatives may go "in the quest to ferret out and prosecute crimes." Id. In Tobias, the DEA set up

a chemical supply company and placed an advertisement in High Times Magazine offering sales of chemicals and laboratory equipment. Tobias contacted the supply company requesting and receiving information about the company. Tobias then placed an order for various chemicals which were never sent. Soon after placing his order, Tobias called the supply company to cancel his order because he had discovered that he lacked sufficient knowledge and equipment to manufacture cocaine. Before he could cancel his order, a DEA Agent inquired as to what Tobias was attempting to do and Tobias admitted that he wanted to make cocaine. The agent pretended to empathize with Tabias and stated that he also found cocaine extremely difficult and expensive to manufacture. Tobias re-

sponded that he was not necessarily interested in manufacturing cocaine, but that he just wanted to make some money. The agent then suggested to Tobias that he make Phencyclidene (PCP) which is as easy as "baking a cake." The agent offered to send Tobias everything he needed, stating that he, the agent, might have a market for PCP in Mobile, and Tobias agreed.

Tobias subsequently called the supply company thirteen times to discuss problems in the manufacturing process and to obtain advice regarding the manufacture of the PCP. Tobias was convicted of conspiring to manufacture and possess PCP with intent to distribute and of manufacturing and possessing PCP with intent to distribute.

In rejecting Tobias' claim that government involvement in the offenses for which he was convicted was so outrageous as to bar his convictions based upon due process, the Eleventh Circuit noted that although the DEA provided the formula and some of the chemicals for the manufacture of PCP, the relevant chemicals were not difficult to obtain and could have been obtained from other supply houses. The court also pointed out that the DEA provided no financial aid for Tobias's operation. Moreover, the DEA did not initiate contact with Tobias, and although the DEA provided crucial step-by-step advice as to how to manufacture the PCP, Tobias or his wife initiated contact with the DEA to obtain this advice. The court found it important that Tobias was not a "predisposed

inactive participant," but instead was a "predisposed active participant" motivated solely by a desire to make money. It did not matter to Tobias whether he manufactured cocaine or PCP or any other illegal drug. Impliedly, the court found that he would have sought help to manufacture and would have manufactured any illegal drug which would have netted him a profit, viz., he would have manufactured a controlled substance for sale even without the help of the DEA.

The Eleventh Circuit made a distinction between the Tobias case and United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), wherein the Third Circuit found the government's conduct so outrageous as to violate due process because a government agent in that case "suggested the establishment of a drug laboratory,

provided the place, equipment, supplies and know-how, and then ran the entire operation with only meager assistance from the defendants. Id. at 386. The Eleventh Circuit recognized that facts similar to the Twiggs case would indeed present the Court with government misconduct which violates fundamental fairness and sufficiently shocks the conscience in violation of the mandate of the due process clause of the Fifth Amendment.

This court must determine whether the facts of this case resemble more the facts in Twiggs or the facts in Tobias. The court must also be mindful of the totality of the circumstances looking to the concrete facts of the case with no single factor controlling.

I. EDENFIELD CASES

The political and personal considerations surrounding the investigation and arrest of the Edenfields cannot be ignored by this court. The court believes that in light of the political background and the personal animosities involved in this case, law enforcement conduct must be carefully perused. While law enforcement should be given great flexibility in investigating crime, to maintain justice, fairness, and decency in the criminal justice process, law enforcement officials cannot be allowed to improperly employ their significant power and resources to settle personal scores.

A. Informant Contingent Fee Agreement

In United States v. Shearer, 794 F.2d 1545 (11th Cir. 1986), the Eleventh Circuit recognized the dangers inherent

in the government entering into a contingent fee agreement with a confidential informant when the government preselects the individual who is to be the target of the informant's investigation. The record of this matter reveals that John and Jim Edenfield were preselected targets of Sheriff Greathouse's investigation and that Watson was contingently paid to gather a specific type of evidence to support an arrest.

Although Watson, the informant, came to law enforcement authorities offering to work undercover in an investigation of certain black crack dealers in Upson County as well as the Edenfields, it soon became apparent that the Edenfields were the focus of the investigation by the Upson County Sheriff's department and the GBI. Not only were the Edenfields prese-

lected targets, but the crime for which they would be arrested was preselected.

The evidence shows that Watson was to be paid for his undercover work based upon the information he received about the Edenfields. Moreover, the evidence shows that this goal was to get one of the Edenfields alone in possession of over an ounce of cocaine, although it was common knowledge that not only did the Edenfields use drugs solely on a recreational basis and sold to friends at cost not for profit, but also that the Edenfields purchased cocaine in relatively small amounts. Prior to the investigation Watson had never procured as much as an ounce in cocaine for the Edenfields. In addition, Sheriff Greathouse and the GBI had at least four separate opportunities to arrest an Edenfield with posses-

sion of cocaine; however, no arrest was undertaken until they could be assured that an Edenfield possessed over an ounce of cocaine.

In addition, although the Magistrate did not resolve the issue of whether law enforcement authorities entered into a contingent fee arrangement with Watson, the court finds that there is sufficient evidence in the record to show that they did.

First, Watson himself believed that he had an agreement with Sheriff Greathouse which provided that he would be paid $10,000 to get an Edenfield in possession of over an ounce of cocaine. Second, the record reflects irregularities in the incomplete Upson County Confidential Informant payment ledger, and affirmative testimony in the record

reveals that the Upson County Confidential Informant Receipt book was destroyed under mysterious circumstances. This discovery followed upon the heels of Sheriff Greathouse's suicide. Third, Sheriff Greathouse took out a loan from the West Central Georgia Bank, paying Watson out of these personal funds, in order to get evidence on the Edenfields, which loan was not formally noted in the appropriate Upson County records. This loan was taken out by the Sheriff although he could have obtained informant funds from the county commissioners of Upson County without explanation. The only logical explanation for the personal loan transaction is that Sheriff Greathouse wished to avoid leaving a paper trail evidencing the improper payments to Watson. When considered together, the

court concludes that Watson was a contingently motivated informant investigating preselected targets.

B. Government Overinvolvement

While it is unclear whether a contingent fee agreement to produce evidence against particular named defendants as to crimes not committed is alone sufficient to support a finding of egregious law enforcement misconduct violative of the due process clause, the court finds that this contingent fee arrangement in conjunction with government overinvolvement in the planning and execution of the crime committed in this matter is violative of the due process clause's prohibitions against deprivation of liberty without due process of law.

The court in Tobias indicated that in defining the acceptable parameters of

government involvement in a crime, those acts done by law enforcement in investigating and intercepting criminal activity which serve a legitimate investigatory purpose will not be sanctioned. See 662 F.2d at 387, n.3. Moreover, those acts which merely provide a defendant with a pre-exiting interest in committing a particular crime an opportunity to do so is not prohibited.

In this case, the record shows that the government's informant not only arranged the drug buy, but also purchased half of the cocaine with government money. Moreover, he had complete discretion as to how much cocaine would be purchased at that buy and how much would be placed in Edenfield's possession. The information was in complete control of the drug deal.

The essential link in the chain which completed the crime charged, was the mixing together of the drugs to constitute an amount over one ounce in weight. Watson mixed these drugs for one purpose only, and that was to trick the defendant Edenfield into possessing an ounce or more of cocaine -- an ounce which he did not want, did not pay for, did not consider his, and which he had never during two months of investigation shown an inclination to wish to purchase, possess, or distribute. The mixing of the drugs by an agent of the government which made possible Edenfield's arrest for trafficking served no legitimate investigatory purpose. His act was not necessary to protect his cover. Moreover, all parties involved in this investigation knew that the Edenfields were

not drug dealers for profit. The informant's acts in setting up and completing the drug deal were not necessary to determine if John Edenfield was an organized crime figure, a purchaser for organized crime, or a small time drug pusher. Everyone was well aware that the Edenfields sold only to their friends at cost or gave drugs to them for free.

The court understands law enforcement's need to use informants, to work undercover, to protect an agent's undercover status by allowing him to participate minimally in drug transactions; however, it is offensive to principles of fundamental fairness for law enforcement agents to commit almost all the acts constituting a crime and then to charge an individual with that crime. If one views the crime charged in this matter as

a chain of events resulting in the possession of an ounce of cocaine, the defendant was undeniably a "meager assistant" to the informant. The court concludes that the facts of this case are more like those in Twigg than those in Tobias.

In this matter law enforcement agents did not merely provide an Edenfield with an opportunity to commit the crime charged. While Jim Edenfield was predisposed to buy a half ounce of cocaine for sale to his friends and for his own recreational use, he never showed any inclination to traffick in cocaine for profit. He would not have bought an ounce of cocaine without the government's participation in instigating and funding the particular crime, creating the relevant amount, and devising a ruse, which

depended upon Edenfield's trust in and friendship with the informant, to induce him to take into his possession over an ounce of cocaine.

While no one factor is controlling in this matter, the court finds that given the political and personal interest of law enforcement officials involved in this case, the preselection of the investigatory target, the government's entering into a contingent fee agreement with an informant to get an Edenfield, and the overinvolvement of the informant as an agent of the government in the planning and execution of the crime charged, a law enforcement conduct in this case is so egregious as to offend principles of due process. The government, whether state or federal, is supposed to be in the business of investigating and intercept-

ing crime in order to punish and deter wrongdoers. The government may not initiate crimes. A sense of ordered justice does not allow for law enforcement activity which results in the preselection of a particular individual for investigation and which results in law enforcement agents acting to ensure that a more serious crime is committed by that targeted individual as a result of the investigation than would have been committed without the acts of the government.

The court concludes that the case against John and James Edenfield should be dismissed.

II. **FRADY CASE**

As for defendant Steven Frady, the court finds that pursuant to their investigation of the Edenfields, law enforce-

ment authorities merely provided Mr. Frady with the opportunity to commit a crime. Mr. Frady was not a preselected target of the investigation pursued by informant Watson. In fact, it is clear from the record that law enforcement authorities had little interest in investigating or arresting Mr. Frady for cocaine distribution. It was not until the federal authorities became interested in this case that Mr. Frady was arrested and charged.

Moreover, the government was not overinvolved in the crime committed by Mr. Frady. While an agent of the government (informant Watson) initiated contact with Mr. Frady in order to procure cocaine, Mr. Frady was already involved in selling drugs and was known to sell drugs for profit. He himself understood all

the acts necessary to obtain and then sell over an ounce of cocaine to Watson and the Edenfields. This is not a situation where Mr. Frady would not have sold drug without the participation of law enforcement authorities. Therefore, the court finds that defendant Frady's right to due process has not been violated by the conduct of law enforcement authorities in this case.

The court also adopts the findings of fact and conclusions of law found in the Magistrate's Report and Recommendation regarding defendant Frady's motion to suppress.

Based on the foregoing, the court adopts the findings of fact, with additions, and rejects the relevant conclusions of law of the Magistrate's Report and Recommendation with respect to John

and James Edenfield; the court adopts the findings of fact, with additions, and the conclusions of law of the Magistrate's Report and Recommendation with respect to Steven Frady. Therefore, James and John Edenfield's motion to dismiss is GRANTED rendering moot their motions to suppress, and Steven Frady's motion to dismiss and motions to suppress are DENIED.

SO ORDERED this 22nd day of May, 1992.

/s/ Robert L. Vining, Jr.
ROBERT L. VINING, JR.
United States District Judge

UNITED STATES of America,
Plaintiff-Appellant,

v.

John M. EDENFIELD, James C. Edenfield, Defendant-Appellees

No. 92-8877.

United States Court of Appeals
Eleventh Circuit

July 14, 1993.

Defendants were charged with cocaine distribution offenses. The United States District Court for the Northern District of Georgia, No. 1:90-CR-415, Robert L. Vining, Jr., J., dismissed indictment, and government appealed. The Court of Appeals, Edmondson, Circuit Judge, held that government's acts in investigating defendants were not outrageous misconduct in violation of due process clause.

Vacated and remanded.

1. Criminal Law 1139

Whether facts show government misconduct so outrageous that it bars prosecution is question of law which Court of Appeals reviews de novo, looking at totality of circumstances.

2. Constitutional Law 257.5

Criminal Law 36.6

Under totality of circumstances, government acts of entering into contingent fee arrangement with confidential informant, selection of targets of investigation, and involvement of informant as agent of government in planning and execution of drug crimes with which defendants were charged were not so outrageous as to violate defendants' due process rights; defendants used and distributed cocaine before investigation, and defendants started each of drug

transactions for which they were indicted equipped with their own, independently acquired knowledge, personal contacts, and hardware. U.S.C.A. Const.Amend.5.

3. Constitutional Law 257

Criminal law 36.6

Government's refusal to pay confidential informant part of his fee until he produced useful evidence was not outrageous conduct which violated defendants' due process rights; no fee was contingent upon obtaining conviction. U.S.C.A. Const.Amend. 5.

4. Criminal law 36.6

Government conduct in selecting defendants as targets of drug investigation was not impermissible preselection of investigatory targets; investigation began only after defendants' friend approach government offering to act as

informant against persons, including defendants, whom he knew to be involved in drugs.

5. Constitutional Law 257.5

Criminal Law 36.6, 37.1

It was irrelevant, for due process purposes, that there was political enmity between defendants' family and sheriff involved in initiating and pursuing investigation of defendants and that family was prominent in community; for law enforcement officers to choose to investigate prominent offenders was not unusual or evil, and it is outrageous misconduct, not law enforcement officer's possible motives, that bars prosecution under due process clause. U.S.C.A. Const.Amend. 5.

6. Constitutional law 257.5

It is showing outrageous misconduct, not evidence about officer's possible motives, that bars prosecution under due process clause. U.S.C.A. Const.Amend. 5

7. Constitutional law 257.5

Criminal Law 36.6

Informant's role in planning and executing drug crimes for which defendants were charged was not outrageous misconduct in violation of due process clause, even though informant's cocaine purchases in one transaction were designed to support mandatory minimum trafficking sentence under Georgia law by ensuring that more than one ounce of cocaine was involved; theory of "sentence entrapment" has been rejected, defendants were long-time users and admitted distributors, and no minimum quantity of

drugs was element of federal offense of possessing with intent to distribute with which defendants were charge. U.S.C.A. Const.Amend. 5.

Mary Jane Stewart, Asst. U.S. Atty., Atlanta, GA, for plaintiff-Appellant.

John R. Martin, Martin Brothers, Atlanta, GA, for John M. Edenfield and James C. Edenfield.

Appeal from the United States District Court for the Northern District of Georgia.

Before EDMONDSON and BLACK, Circuit Judges, and MELTON*, Senior District Judge.

EDMONDSON, Circuit Judge:

In this drug distribution case, the district court dismissed the federal indictment for "outrageous misconduct" by

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*Honorable Howell W. Melton, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

state officers who investigated the charged offenses. We reverse.

I. *Background*

The important facts are undisputed. John and James Edenfield ("defendants") admit that they used cocaine, shared cocaine with friends, and sold cocaine to friends at cost.[1]

The evidence showed that John Edenfield, Sr., defendants' father, was a prominent Thomaston, Georgia businessman. Defendants' father was on bad terms with the Upson County Sheriff, Merrill Greathouse. The elder Edenfield had exchanged hard words with the Sheriff over Sheriff Greathouse's investigation of an Edenfield employee and had actively supported

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[1]Br. of Appellees at 3.

the Sheriff's opponent in local elections.

Tony Watson was a friend of the defendants. Watson's car business was failing and he needed money. In 1989, Watson initiated a meeting with Sheriff Greathouse and a Georgia Bureau of Investigation (GBI) agent, Charles McMichen. Watson proposed that, in exchanged for $10,000, he would act as a confidential informant against the Edenfields. Sheriff Greathouse and Agent McMichen agreed to pay Watson an informant fee, but only for "results" or "COD."

In September and October 1989, state officers supervised four separate controlled buys of one-eighth ounce amounts of cocaine by Watson from defendants. The police obtained physical evidence, photographs, and tape recordings of those

transactions but made no arrest. The police paid Watson about $3600 for those four transactions.

Sheriff Greathouse met with Watson in late October, 1989. The Sheriff told Watson that the officers' goal was for an Edenfield "to be busted with over an ounce."[2] The Sheriff offered that, if Watson could get one of the Edenfield boys in a car with more than an ounce of cocaine, the Sheriff and the GBI would pay Watson $10,000-$4,000 in advance and $6,000 afterward. Watson agreed; and the sheriff paid him the $4,000 advance, part of which the sheriff had apparently personally borrowed from a bank.

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[2]Under Georgia law, a conviction for distributing more than one ounce of cocaine mandates a minimum ten-year term of imprisonment and a $100,000 fine with no possibility of probation. See O.C.G.A. § 16-13-31(a).

On November 10, 1989, James Edenfield called Watson asking for Watson to arrange for them to buy "14" from an Atlanta dealer, Frady. Watson thought Edenfield meant $1,400 worth, or about an ounce of cocaine. Watson reported this information to Sheriff Greathouse and then ordered the ounce from Frady. Later conversation made clear that Edenfield had meant 14 grams (about a half-ounce), and Watson called Greathouse with that new information. Watson, Sheriff Greathouse, and Special Agent McMichen met to discuss the transaction. Sheriff Greathouse gave Watson $800 to buy an additional half-ounce, ostensibly for Watson; and the GBI agent gave him $500 to buy an additional one-eighth of an ounce. The GBI agent testified that the plan was that the total purchase (Edenfield's

half-ounce, plus Watson's half- and eighth-ounce purchases) would be more than one ounce, enough for a "trafficking case."

Watson and James Edenfield went to Atlanta to meet Frady at a drive-in restaurant. En route, Watson told Edenfield twice that Watson intended to buy a second half-ounce for himself and showed defendant his money. Watson met with Frady and bought parcels of cocaine totalling one and one-eighth ounces, which Watson put together in one bag and gave to Edenfield in the car. As planned, Watson asked Edenfield to drop Watson off on the way home to pick up a car. Edenfield dropped Watson off in Griffin, Georgia. Shortly afterward, James Edenfield was arrested enroute from

Griffin to Thomaston and later charged with trafficking cocaine under state law.

Later, a federal grand jury indicted the Edenfields for four federal drug offenses. Count one of the indictment charged that defendants had conspired to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. Three other counts charged that defendants had possessed cocaine with intent to distribute in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2 on three occasions, including the November 10 transaction.

Defendants moved the district court to dismiss the federal indictment, claiming their due process rights were violated by outrageous government misconduct. After an evidentiary hearing about the investigation of the defendants, the

district court granted the motion, saying:

> While no one factor is controlling in this matter, the court finds that given the political and personal interest of law enforcement officials involved in this case, the preselection of the investigatory target, the government's entering into a contingent fee agreement with an informant to get an Edenfield, and the overinvolvement of the informant as an agent of the government in the planning and execution of the crime charged, law enforcement conduct in this case is so egregious as to offend principles of due process.[3]

The government brought this appeal.

II. *Discussion*

[1] Our cases have recognized that "in the rarest and most outrageous circumstances" government conduct might violate "'that fundamental fairness,

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[3]R. Vo. 1-62 at 20.

shocking to the universal sense of justice mandated by the due process clause of the Fifth Amendment.'" *United States v. Tobias*, 662 F.2d 381, 386-87 (5th Cir. Unit B. 1981), *quoting United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973). Whether facts show misconduct so outrageous that it bars prosecution is a question of law which we review *de novo*, looking at the "totality of the circumstances." *Tobias*, 662 F.2d at 387.

[2] We think no government acts violated the Edenfields' due process rights. The evidence showed that for the offenses charged the defendants were "predisposed active participants." *See id.* The evidence shows defendants used *and distributed* cocaine before the investigation in this case. Equipped with

their own, independently acquired knowledge, personal contacts, and hardware, defendant started each of the drug transactions mentioned in the federal indictment. The government did not instigate the criminal activity, provide the place, equipment, supplies, and know-how, and run the entire operation with only meager assistance from the defendants." *Cf. id.* at 386, *citing United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978).

[3] For the district court to view the government's fee agreement with Watson as part of a due process violation was wrong. Although "in rare cases, use of a contingently motivated informer might, conceivably, be so outrageous as to violate due process," we have rejected the idea "that absent justification or explanation, payment of an informer

contingent upon obtaining the conviction of a specific person *in itself* violates due process." *United States v. Rey*, 811 F.2d 1453, 1456 (11th Cir. 1987). We see nothing outrageous about the government's refusal to pay Watson part of his fee until he produced useful evidence. *Cf. United States v.Shearer*, 794 F.2d 1545, 1549 (11th Cir. 1986)(fee paid to informer before defendant's trial was not contingent on conviction and so violated no due process rights). No fee was contingent upon obtaining a conviction.

[4] In a similar way, it was error for the district court to factor "preselection of the investigatory target" into its ultimate conclusion. This case is no preselection case: the investigation began only after Watson approached the government offering to act as an

informant against persons, including Edenfields, whom Watson knew to be involved with drugs. Where a potential informer approaches the government with names and the government merely "select[s] who the informer would concentrate upon before making the financial arrangements ... the agents' decision is better described as an approval than as a selection." *United States v. Richardson*, 764 F.2d 1514, 1520 (11th Cir. 1985).

[5,6] And it is irrelevant, for due process purposes, that there was political enmity between the Edenfields and Sheriff Greathouse or that the Edenfields were prominent in their community. For law enforcement officers to choose to investigate prominent offenders is nothing unusual or evil. It is a showing of

outrageous *misconduct*, not evidence about an officer's possible motives, that bars prosecution under the due process clause.

[7] We also see no outrageous misconduct in Watson's role in planning and executing the crimes charged. Although the evidence showed that Watson's purchases in the November 10 transaction were designed to support a mandatory minimum trafficking sentence under Georgia law, we have expressly rejected the theory of "sentence entrapment." *See, e.g., United States v. Williams*, 954 F.2d 668, 672-73 (11th Cir. 1992)(no defense that "government manipulated the transaction in order to get the mandatory minimum sentence"). This case is not one where the government instigated commission of a distribution offense by mere users; these defendants were long-time

and admitted distributors. And we point out that no minimum quantity of drugs is an element of the charged federal offense of possessing with intent to distribute cocaine. Therefore, the presence of an ounce or more of cocaine in Edenfield's automobile is not a critical matter. Simply put, nothing about the government's conduct in this case is shocking to the "*universal* sense of justice" of the due process clause. *Russell*, 411 U.S. at 432, 93 S.Ct. at 1643 (emphasis added).

Considering the "totality of the circumstances" as well as the "parts that make up the whole," *Tobias*, 662 F.2d at 387, we conclude that the government's conduct in investigating the charged offenses violates no due process rights

of the appellees. It was error to dismiss the indictment.[4]

III. *Conclusion*

The order dismissing the indictment is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

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[4]The misconduct in this case was conduct of state officers acting apart from the federal government. Yet it is a federal prosecution for the violation of federal law that would be barred. We rely in no way on the idea of two separate sovereigns-(1) the State of Georgia and (2) the United States of America-to allow this prosecution to proceed. But we do note that some question exists about when state officer misconduct would, as a matter of law, completely bar a federal prosecution.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 92-8877

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

Versus

JOHN M. EDENFIELD
JAMES C. EDENFIELD,

Defendant-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and BLACK, Circuit Judges, and MELTON*, Senior District Judge.

PER CURIAM:

( ) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. EDMONDSON
UNITED STATES CIRCUIT JUDGE

*Honorable Howell W. Milton, Senior U.S. District Judge for the Middle District of Florida, sitting by designation.

(2)

Supreme Court, U.S.
FILED
JUL 26 1994
OFFICE OF THE CLERK

No. 93-1965

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN M. EDENFIELD AND JAMES C. EDENFIELD,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing the order of the district court dismissing the indictment in this case.

1. Petitioners were indicted by a grand jury sitting in the Northern District of Georgia. They were charged with one count of conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and three counts of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841. Pet. App. 57a.

On May 22, 1992, the district court granted petitioners' motion to dismiss the indictment on the ground that the egregious conduct of law enforcement officials in investigating petitioners offended due

process. The court found that the outrageous government misconduct resulted from a combination of factors—the political and personal interest of the law enforcement officials, their selection of the investigatory target with a contingent fee agreement with the informant "to get an Edenfield," and the informant's degree of involvement as a government agent in the crime charged. Pet. App. 1a-45a, 57a-58a.

The court of appeals reversed and remanded for further proceedings. Pet. App. 46a-65a. It concluded that the government's conduct in investigating petitioners did not violate their due process rights. The court stated that evidence of an officer's possible motives did not establish a due process violation; only a showing of outrageous misconduct could amount to such a violation. *Id.* at 62a-63a. The court also stated that the government did not instigate the crimes with which petitioners were charged; rather, the evidence showed that petitioners were not mere users but "were long-time and admitted distributors [of cocaine]." *Id.* at 63a-64a. "Simply put," the court concluded, "nothing about the government's conduct in this case is shocking to the universal sense of justice of the due process clause." *Id.* at 64a (emphasis and internal quotation marks omitted). Accordingly, the court reversed the dismissal of the indictment. *Id.* at 65a.

2. Petitioners contend (Pet. 17-23) that the court of appeals, in concluding that their due process rights were not violated, erroneously ruled that the motivation of the government agents is irrelevant. Petitioners also contend (Pet. 24-30) that the court of appeals erred in failing to consider the extent of their suspected involvement in the distribution of cocaine. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision

places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

JULY 1994

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* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.